

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-0900479
	:	TRIAL NO. B-0809527
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
BENOIT NTARUMOTIMA,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Following a jury trial, defendant-appellant Benoit Ntarumotima was convicted of rape,² felonious assault,³ and kidnapping.⁴ He was sentenced to an aggregate prison term of 20 years. Bringing forth four assignments of error, Ntarumotima now appeals. For the following reasons, we affirm.

In his first assignment of error, Ntarumotima contests the sufficiency of the evidence underlying his rape conviction. In his second assignment of error, he argues that the trial court erred by denying his Crim.R. 29 motion with respect to the rape conviction. We consider these assignments together, as they involve the same issue.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

² R.C. 2907.02(A)(2).

³ R.C. 2903.11(B)(1).

⁴ R.C. 2905.01(A)(4).

In a challenge to the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt.⁵ The standard of review for a Crim.R. 29 motion to acquit is the same.⁶

Under these assignments of error, Ntarumotima argues that the state did not adequately prove that he had forced the victim to perform fellatio. Specifically, he argues that the state never proved that his penis came into contact with the victim's mouth. Although the victim testified that Ntarumotima forced her to perform "oral sex" and that "he pulled down his pants and told [her] to suck his dick," Ntarumotima contends that these colloquial terms left the jury to speculate on whether fellatio had been committed. We disagree.

First, the term fellatio is not defined in the Revised Code. But courts, like the trial court here, usually instruct the jury that fellatio involves sexual contact between the penis and the mouth. Although the victim did not use the term "penis" and the term "mouth" in describing what she was forced to do during the rape, she did use phrases that are commonly used in our community to describe fellatio. While it may be best for the state to clarify that "dick" means "penis" and "oral sex" in this circumstance meant penis-to-mouth contact, we cannot say that the evidence presented to the jury here was insufficient to prove fellatio. The victim testified that Ntarumotima pulled his pants down and then told her to "suck his dick." Based on these actions and words, we do not believe that the jury was left to speculate about whether Ntarumotima was requiring the victim to perform fellatio.

⁵ *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

⁶ *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus.

Accordingly, upon a thorough review of the record, we hold that there was sufficient evidence to prove rape. Further, we hold that the trial court did not err in denying Ntarumotima's Crim.R. 29 motion. The first and second assignments of error are overruled.

In his third assignment of error, Ntarumotima argues that the trial court erred by failing to merge his convictions for kidnapping and rape because they involved allied offenses of similar import.

Under R.C. 2941.25, Ohio's multiple-count statute, if a defendant's conduct results in allied offenses of similar import, the defendant may only be convicted of one of the offenses.⁷ But if the defendant commits each offense separately or with a separate animus, then convictions may be entered for both offenses.⁸

The Ohio Supreme Court has provided guidance concerning whether kidnapping and another offense (in this case, rape) were committed with the same or a separate animus. In *State v. Logan*, the court held that "[w]here the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions."⁹

Here, the victim testified that Ntarumotima had grabbed her by the hair as she was walking on the sidewalk, pressed something cold and sharp against her neck

⁷ R.C. 2941.25(A).

⁸ R.C. 2941.25(B).

⁹ *State v. Logan* (1979), 60 Ohio St.2d 126, 397 N.E.2d 1345, syllabus.

and dragged her down the steps to a secluded spot underneath an overpass. He kept her there for at least two and one-half hours while he drank and used narcotics, and then he raped her. The evidence demonstrates that the time involved in the kidnapping was much longer than necessary to commit the rape.¹⁰ Accordingly, we hold that the prolonged restraint of the victim demonstrated a separate animus for each offense sufficient to support separate convictions. The third assignment of error is overruled.

In his final assignment of error, Ntarumotima maintains that the trial court erred by imposing consecutive sentences without making the necessary statutory findings. We are unpersuaded.

Ntarumotima acknowledges that, in *State v. Foster*, the Ohio Supreme Court held that R.C. 2929.14 and 2929.41(A) were unconstitutional because they required judicial fact-finding.¹¹ But he urges this court to conclude that *Foster* is no longer valid with respect to consecutive sentences in light of the United States Supreme Court's decision in *Oregon v. Ice*.¹² In that case, the Court concluded that Oregon's sentencing statute, which, like Ohio's, requires judicial fact-finding before the presumption of concurrent sentences can be overcome and consecutive sentences can be imposed, was constitutional.¹³ But we agree with other Ohio appellate districts that have considered the issue.¹⁴ We remain bound by the Ohio Supreme Court's decision in *Foster*. The Ohio Supreme Court has not directly addressed the effect of *Oregon v. Ice* on Ohio's sentencing law. Absent a contrary decision by the

¹⁰ See *State v. Taylor*, 7th Dist. No. 07MA115, 2009-Ohio-3334.

¹¹ 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, paragraph three of the syllabus.

¹² (2009), ___ U.S. ___, 129 S.Ct. 711.

¹³ *Id.* at 719.

¹⁴ See *State v. Miller*, 6th Dist. No. L-08-1314, 2009-Ohio-3908; *State v. Robinson*, 8th Dist. No. 92050, 2009-Ohio-3379; *State v. Mickens*, 10th Dist. Nos. -8AP-743, 08AP-744, and 08AP-745, 2009-Ohio-2554; *State v. Krug*, 11th Dist. No. 2008-L-085, 2009-Ohio-3815.

Ohio Supreme Court, *Foster* still applies to consecutive sentences. The trial court did not err when it imposed consecutive sentences without making findings of fact. The fourth assignment of error is overruled.

Therefore we affirm the trial court's judgment.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., SUNDERMANN and MALLORY, JJ.

To the Clerk:

Enter upon the Journal of the Court on April 28, 2010

per order of the Court _____.
Presiding Judge